

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

OCT 29 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Tariff Filing Requirements for ) CC Docket No. 93-36  
Nondominant Common Carriers )

COMMENTS OF CITICORP

Citicorp, by its attorneys, hereby submits the following comments in support of the Petition for Partial Reconsideration which the Ad Hoc Telecommunications Users Committee ("Ad Hoc Committee") filed in the above-captioned proceeding on September 22, 1993.<sup>1</sup> As set forth below, the Commission should grant the requested relief.

As a major user of communications services, Citicorp fully supports the Commission's efforts to promote competition in the interexchange communications marketplace, including its decision to streamline the regulation of nondominant common carriers. Like other users with contracts with nondominant carriers, however, Citicorp is concerned about the consequences of the Memorandum Opinion and Order ("Order") which the Commission issued in this proceeding.<sup>2</sup> In particular, Citibank is concerned that the

1/ See Petition for Partial Reconsideration of the Ad Hoc Telecommunications Users Committee, CC Docket No. 93-36 (filed Sep. 22, 1993) [hereinafter "Ad Hoc Committee Petition"].

2/ Tariff Filing Requirements for Nondominant Common Carriers, CC Docket No. 93-36, FCC 93-401 (released Aug. 18, 1993) [hereinafter "Order"].

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Commission's Order will effectively make long-term communications service contracts unenforceable by users.

I. THE PRACTICAL EFFECT OF THE COMMISSION'S ORDER IS TO RENDER COMMUNICATIONS SERVICE CONTRACTS UNENFORCEABLE.

By reducing the notice period for nondominant carrier tariff filings from two weeks to one day, the Commission has effectively decided to allow these tariffs to take effect without review by either the Commission or the customers that take service pursuant to these tariffs. Although Citicorp applauds the Commission's decision to streamline the tariff filing process, Citicorp fears that the carriers will misuse this flexibility and take unfair advantage of the tariff precedence doctrine to unilaterally alter their contractual arrangements with end users.

Like the Ad Hoc Committee, Citicorp is unpersuaded that competition -- standing alone -- will deter nondominant carriers from abrogating their contracts by filing inconsistent tariffs.<sup>3</sup> Today's substantial body of contract law is testament to the fact that market forces alone are not sufficient to ensure that contracts are observed. Although the Commission is certainly correct that a carrier that fails to honor its long-term service contracts "would risk harming its reputation and position in the competitive telecommunications marketplace,"<sup>4</sup> the courts are full of

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<sup>3/</sup> See Ad Hoc Committee Petition at 4-5.

<sup>4/</sup> Order at ¶ 25.

cases in which businesses have decided to assume that risk. Indeed, the Ad Hoc Committee has identified an instance in which one common carrier has relied on its tariff to avoid an allegedly inconsistent contract provision.<sup>5</sup> Now that nondominant carriers are required to file tariffs, the frequency of such instances is likely to increase.

In addition to overstating the constraining influence of a competitive marketplace, the Order attributes more options than actually exist to a user confronted with a unilateral change in the terms of its contract with a carrier. Because communications is something which cannot be done without, a customer has no choice but to abide by the terms of new tariff revisions. The alternatives -- risking loss of service for failure to comply with the tariff or terminating service prematurely and paying a sizable penalty<sup>6</sup> -- are really no alternatives at all. And, given the state of the law, challenging an inconsistent tariff provision would be a speculative remedy at best.

In short, the effect of the Commission's order is to deprive users of the benefits which induced them in first instance to enter long-term contracts with the carriers.

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5/ See Ad Hoc Committee Petition at 5.

6/ Moreover, changing carriers involves substantial business-related changes, time, and expense.

II. THE COMMISSION SHOULD RECONSIDER ITS ORDER SO AS TO ENSURE THE ENFORCEABILITY OF LONG-TERM SERVICE CONTRACTS.

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Citicorp agrees with the Commission that a one-day notice period for tariff filings that do not alter the terms of underlying service contracts would reduce the administrative burdens on nondominant carriers and enhance the efficiency of the marketplace. Citicorp believes that a one-day notice period for tariff filings is appropriate when a filing seeks to amend a tariff to conform it to a negotiated contract and amendments thereto, or when the carrier certifies in the relevant transmittal letter that the customers affected by a tariff filing that unilaterally alters the contractual relationship have been informed of the proposed revisions and have raised no objections. If carriers are unable to certify that they have informed the affected customers, or if the affected customers have objected, a forty-five-day notice period should be required.

In any event, the Commission should permit customers to terminate service without liability if a tariff filing that alters in an adverse manner the relationship between the parties is permitted to take effect. If customers do not have the right to terminate in such circumstances, the carriers will have an enormous incentive to alter unilaterally their contractual obligations through the filing of inconsistent tariffs. The right to terminate without liability under such circumstances would give customers the opportunity to procure service elsewhere.

It is important to note that none of the foregoing safeguards will unfairly burden the carriers. If the Commission is correct in its belief that marketplace forces will deter the carriers from filing tariff revisions that are inconsistent with their underlying service agreements, these safeguards will never come into play. If Citicorp and the Ad Hoc Committee are correct, the proposed safeguards will apply only to those carriers that inappropriately seek to avoid their lawful contractual obligations. Surely, that cannot be seen as a burden. The Commission should therefore adopt the safeguards outlined above.

III. CONCLUSION

For the reasons discussed above, the Commission should grant the Ad Hoc Committee's petition for partial reconsideration.

Respectfully submitted,

CITICORP



By: P. Michael Nugent  
Room 2265  
425 Park Avenue  
New York, New York 10043  
(212) 559-0142

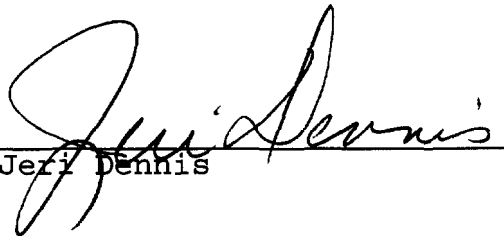
Joseph P. Markoski  
Jeffrey A. Campbell  
Squire, Sanders & Dempsey  
1201 Pennsylvania Avenue, N.W.  
P.O. Box 407  
Washington, D.C. 20044  
(202) 626-6600

Its Attorneys

October 29, 1993

CERTIFICATE OF SERVICE

I, Jeri Dennis, hereby certify that copies of the foregoing Comments of Citicorp was served by hand or by, First Class United States Mail, postage prepaid, upon the parties appearing on the attached service list this 29th day of October, 1993.

  
Jeri Dennis

Donna A. Searcy  
Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D.C. 20554

ITS  
1919 M Street, N.W.  
Room 246  
Washington, D.C. 20554

Cheryl A. Tritt, Esq.  
Chief, Common Carrier Bureau  
Federal Communications Commission  
1919 M Street, N.W., Room 500  
Washington, D.C. 20554

Gregory J. Vogt  
Chief, Tariff Division  
Federal Communications Commission  
1919 M Street, N.W., Room 518  
Washington, D.C. 20554

Honorable Andrew C. Barrett  
Commissioner  
Federal Communications Commission  
1919 M Street, N.W., Room 844  
Washington, D.C. 20554

James D. Schlichting  
Chief  
Policy and Program Planning  
Division  
Common Carrier Bureau  
Room 544  
1919 M Street, N.W.  
Washington, D.C. 20554

Honorable James H. Quello  
Chairman  
Federal Communications Commission  
1919 M Street, N.W., Room 802  
Washington, D.C. 20554

Ruth Milkman  
Deputy Chief  
Policy and Program Planning  
Division  
Common Carrier Bureau  
Room 544  
1919 M Street, N.W.  
Washington, D.C. 20554

Honorable Ervin S. Duggan  
Commissioner  
Federal Communications Commission  
1919 M Street, N.W., Room 832  
Washington, D.C. 20554

James S. Blaszak  
Patrick J. Whittle  
Gardner, Carton & Douglas  
1301 K Street, N.W.  
Suite 900, East Tower  
Washington, D.C. 20005

John L. Bartlett  
Robert J. Butler  
Rosemary C. Harold  
Wiley, Rein & Fielding  
1776 K Street, N.W.  
Washington, D.C. 20006

Robert W. Healy  
Smithwick & Belendiuk, P.C.  
1990 M Street, N.W.  
Suite 510  
Washington, D.C. 20036

R. Michael Senkowski  
Jeffrey S. Linder  
Michael K. Baker  
Wiley, Rein & Fielding  
1776 K Street, N.W.  
Washington, D.C. 20006

Albert Halprin  
Melanie Haratunian  
Halprin, Temple & Goodman  
Suite 1020, East Tower  
1301 K Street, N.W.  
Washington, D.C. 20005

Randolph J. May  
Richard S. Whitt  
Sutherland, Asbill & Brennan  
1275 Pennsylvania Avenue, N.W.  
7th Floor  
Washington, D.C. 20004

Doris S. Freedman  
Barry Pineles  
Office of Advocacy  
U.S. Small Business  
Administration  
409 3rd Street, S.W.  
Washington, D.C. 20554

Sam Antar  
Capital Cities/ABC, Inc.  
77 West 66th Street  
New York, New York 10023

Martin W. Bercovici  
Keller and Heckman  
Suite 1000  
1150 17th Street, N.W.  
Washington, D.C. 20036

Howard Monderer  
National Broadcasting Company, Inc.  
Suite 930, North Office Bldg.  
1331 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004

Ellen S. Deutsch  
Senior Counsel  
Electric Lightwave, Inc.  
8100 N.E. Parkway Drive  
Suite 200  
Vancouver, WA 98662



Steven J. Hogan  
President  
LinkUSA Corporation  
230 Second Street S.E.  
Suite 400  
Cedar Rapids, Iowa 52401

Danny E. Adams  
Michael K. Baker  
Wiley, Rein & Fielding  
1776 K Street, N.W.  
Washington, D.C. 20006

Josephine S. Trubek  
180 South Clinton Avenue  
Rochester, New York 14646

Genevieve Morelli  
V.P. & General Counsel  
Competitive Telecommunications  
Association  
1140 Connecticut Avenue, N.W.  
Suite 220  
Washington, D.C. 20036

James P. Tuthill  
John W. Bogy  
Pacific Bell and Nevada Bell  
Room 1530-A  
140 New Montgomery Street  
San Francisco, California 94105

Thomas A. Stroup  
Mark Golden  
Telocator  
1019 19th Street, N.W.  
Suite 1100  
Washington, D.C. 20036

James L. Wurtz  
1275 Pennsylvania Ave., N.W.  
Washington, D.C. 20004

Donald J. Elardo  
MCI Telecommunications Corp.  
1801 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006

Walter Steimel, Jr.  
Fish & Richardson  
601 13th Street, N.W.  
5th Floor North  
Washington, D.C. 20005

Cindy Z. Schonhaut  
Vice President  
Government Affairs  
MFS Communications Co., Inc.  
3000 K Street, N.W.  
Suite 300  
Washington, D.C. 20007

Andrew D. Lipman  
Jonathan E. Canis  
Swidler & Berlin  
3000 K Street, N.W.  
Suite 300  
Washington, D.C. 20007

Heather Burnett Gold  
President  
Association for Local  
Telecommunications Services  
1150 Connecticut Avenue, N.W.  
Suite 1050  
Washington, D.C. 20036

Scott K. Morris  
Vice President, Law  
McCaw Cellular Communications, Inc.  
5400 Carillion Point  
Kirkland, WA 98033

Brian R. Moir  
Fisher, Wayland, Cooper  
and Leader  
Suite 800  
1255 23rd Street, N.W.  
Washington, D.C. 20037

Cathleen A. Massey  
Senior Regulatory Counsel  
McCaw Cellular Communications, Inc.  
1250 Connecticut Avenue, N.W.  
Suite 401  
Washington, D.C. 20036

Michael F. Altschul  
Michael C. Farquhar  
Two Lafayette Centre, Suite 300  
1133 21st Street, N.W.  
Washington, D.C. 20036

Carl W. Northrop  
Bryan Cave  
Suite 700  
700 13th Street, N.W.  
Washington, D.C. 20005

Anne P. Jones  
David A. Gross  
Sutherland, Asbill & Brennan  
1275 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004

W. Bruce Hanks  
President  
Century Cellunet, Inc.  
100 Century Park Avenue  
Monroe, LA 71203

Brian D. Kidney  
Pamela J. Riley  
Pactel Corporation  
2999 Oak Road, MS 1050  
Walnut Creek, CA 94569

Albert H. Kramer  
Robert F. Aldrich  
Keck, Mahin & Cate  
1201 New York Avenue, N.W.  
Penthouse Suite  
Washington, D.C. 20005

William B. Barfield  
Richard M. Sbaratta  
Rebecca M. Lough  
Suite 1800  
1155 Peachtree Street, NE  
Atlanta, GA 30367-6000

Francine J. Berry  
R. Steven Davis  
American Telephone and  
Telegraph Company  
Room 3244J1  
295 North Maple Avenue  
Basking Ridge, New Jersey 07920

James D. Ellis  
William J. Free  
Paula J. Fulks  
Southwestern Bell Corp.  
175 E. Houston, Rm. 1218  
San Antonio, TX 78205

Michael D. Lowe  
Lawrence W. Katz  
Bell Atlantic  
1710 H Street, N.W.  
Washington, D.C. 20006

James P. Tuthill  
John W. Bogy  
Pacific Bell and Nevada Bell  
140 New Montgomery Street  
Room 1529  
San Francisco, CA 04105

Leon M. Kestenbaum  
Michael B. Fingerhut  
Marybeth M. Banks  
1850 M Street, N.W.  
Suite 1110  
Washington, D.C. 20036

Martin T. McCue  
General Counsel  
U.S. Telephone Association  
900 19th Street, N.W.  
Suite 800  
Washington, D.C. 20006-2105

Philip V. Otero  
Alexander P. Humphrey  
GE American Communications, Inc.  
1331 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004

J. Manning Lee  
Senior Regulatory Counsel  
Teleport Communications Group  
1 Teleport Drive, Suite 301  
Staten Island, NY 10311

Spencer L. Perry, Jr.  
Senior Director-External Affairs  
Telecommunications Resellers  
Association  
P.O. Box 5090  
Hoboken, NJ 07030

Patrick A. Lee  
Edward E. Niehoff  
New York Telephone Company  
and New England Telephone  
and Telegraph Company  
120 Bloomingdale Road  
White Plains, NY 10605

David C. Jatlow  
Young and Jatlow  
2300 N. Street, N.W.  
Suite 600  
Washington, D.C. 20037

Randall B. Lowe  
Mary E. Brennan  
Jones, Day, Reavis & Pogue  
1450 G Street, N.W.  
Washington, D.C. 20005

David Cosson  
L. Marie Guillory  
National Telephone Cooperative  
Association  
2626 Pennsylvania Avenue, N.W.  
Washington, D.C. 20037

Floyd S. Keene  
Mark R. Ortlieb  
Ameritech  
2000 W. Ameritech Center Drive  
Room 4H84  
Hoffman Estates, IL 60196-1025

Kathy L. Shobert  
Director, Federal Regulatory  
Affairs  
888 16th Street, N.W.  
Suite 600  
Washington, D.C. 20006

Stuart Dolgin  
House Counsel  
Local Area  
Telecommunications, Inc.  
17 Battery Place  
Suite 1200  
New York, NY 10004

Joe Alexander  
Manager  
Two-Way Radio Communications  
Co. of Kansas, Inc.  
43 Western Avenue  
P.O. Box 1066  
Liberal, Kansas 67905

Catherine Wang  
Swidler & Berlin, Chartered  
3000 K Street, N.W.  
Washington, D.C. 20007

Kenneth Robinson  
Lafayette Center  
P.O. Box 57-455  
Washington, D.C. 20036